

No. 89-616

Supreme Court, U.S.

FILED

DEC -22 1989

JOSEPH F. SPANIOLO,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BRIAN SCHOENFIELD,
Petitioner,

VS.

COUNTY OF HUMBOLDT, TERRY FARMER, RODNEY LESTER,
BARBARA ALLSWORTH, and SYLVIA DOUGLAS
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DALE REINHOLTSSEN
NANCY K. DELANEY
MITCHELL, DEDEKAM & ANGELL
814 Seventh Street
P. O. Box 1008
Eureka, CA 95502
Telephone: (707) 443-5643
Attorneys for Respondents

COUNTER STATEMENT OF QUESTION(S) PRESENTED

As disussed below, the Petition For Writ Of Certioari should be denied because, contrary to what is represented in the petition, the decision of the United States Court of Appeals for the Ninth Circuit in this case is in accord with the decisional law of virtually every other Circuit. It stands for the fundamental notion that absent a deprivation that implicates federally guaranteed rights, a claim simply asserting the common law elements of the tort of malicious prosecution is not actionable under 42 U.S.C. Section 1983.

The sole question then presented by this case is:

Whether this Court should expand the scope of liability under 42 U.S.C. Section 1983 to embrace the common law tort of malicious prosecution if the alleged tortfeasor acts under color of state law but no federally protected right is implicated?

TABLE OF CONTENTS

	<u>Page</u>
Counter Statement of Question(s) Presented	i
Statement of the Case	1
The Amended Complaint	2
What Is Not Alleged	2
Argument	3

I

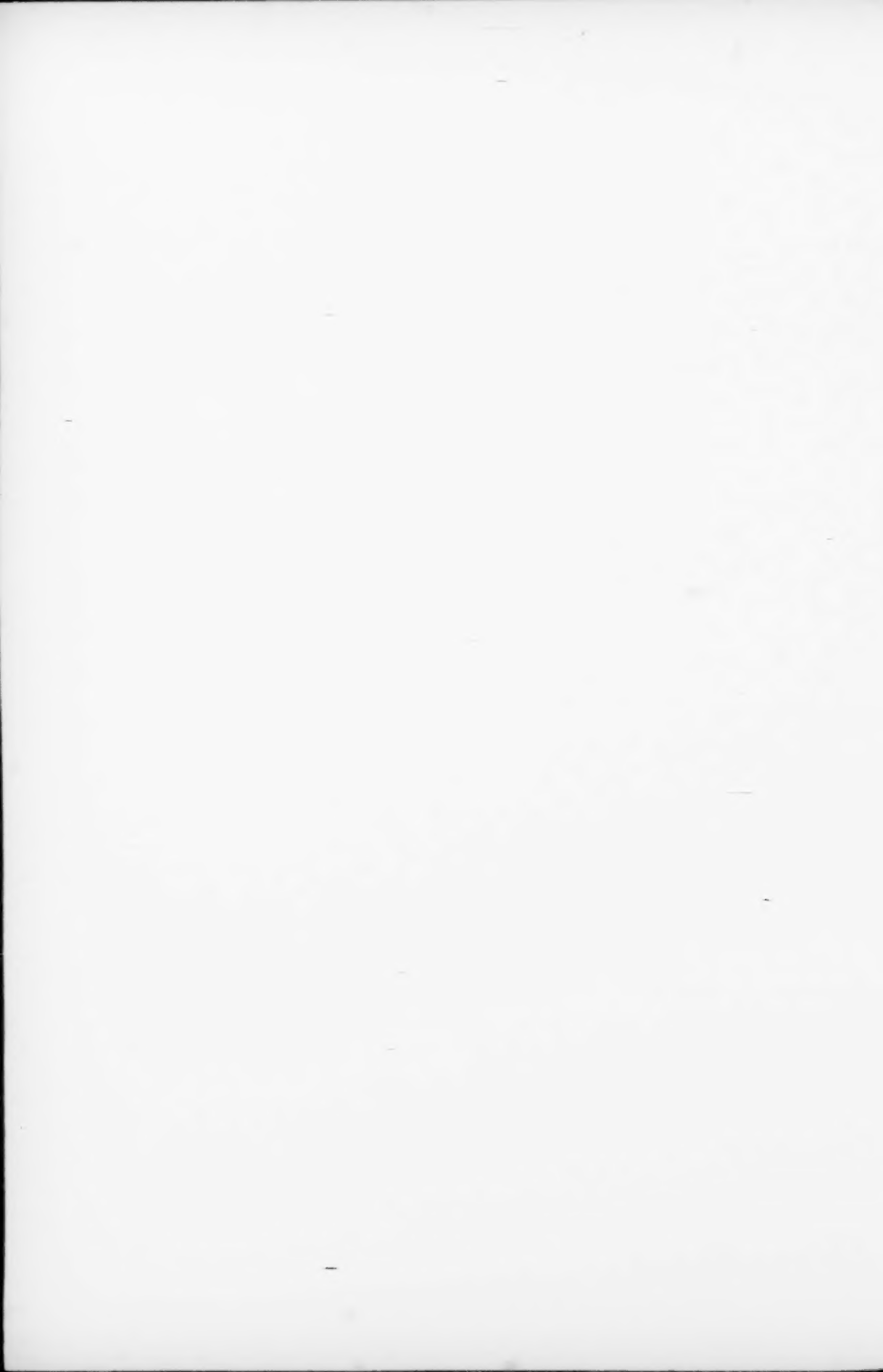
There is No Conflict Between The Decision Of The Ninth Circuit In This Case And Those Of Other Circuits Because No Court Has Held Prosecution Resulting From Errors During The Intermediate Investigation Phase, Preceded By An Arrest For Probable Cause Untainted By The Involvement Of State Agents And Followed By A Fair Trial Is Actionable Under 42 U.S.C. Section 1983 ...	3
--	---

II

The Ninth Circuit Properly Concluded That Petitioner's First Amended Complaint Did Not State A Claim Actionable Under 42 U.S.C. Section 1983 Because No Deprivation Of A Federally Protected Right Is Alleged	4
Conclusion	7

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
Baker v. McCollan, 443 U.S. 173 (1979)	5
Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985)	4
California v. Trombetta, 467 U.S. 479 (1984)	5
Cline v. Brussett, 661 F.2d 108 (9th Cir. 1981)	4
Gerstein v. Pugh, 420 U.S. 103 (1975)	3
Hand v. Gary, 838 F.2d 1420 (5th Cir. 1986)	4
Paul v. Davis, 424 U.S. 693 (1976)	6
Wheeler v. Cosden Oil & Chemical, 734 F.2d 254 (5th Cir. 1984); Modified on other grounds, 744 F.2d 1131 (5th Cir. 1984)	3
Constitutions, Statutes and Rules	
U.S. Constitution:	
Amendment IV	2
Amendment V	2
42 U.S.C. § 1983	3, 4, 7
Federal Rule of Civil Procedure 12(b)(6)	1
Articles	
Actionability Of Malicious Prosecution Under 42 USCS § 1983, 79 A.L.R. Fed. 896 (1986)	3



No. 89-616

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1989

BRIAN SCHOENFIELD,
Petitioner,

VS.

COUNTY OF HUMBOLDT, TERRY FARMER, RODNEY LESTER,
BARBARA ALLSWORTH, and SYLVIA DOUGLAS
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, County of Humboldt, Terry Farmer, Rodney Lester, Barbara Allsworth and Sylvia Douglas, respectfully submit this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Respondents do not dispute that petitioner is entitled to have this Court treat all allegations of his complaint as true because this matter was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) following his unsuccessful attempt to amend the complaint to implicate some federally protected right.

The Amended Complaint

Allegations not recited in the petition include:

Between October, 1984, and December, 1984, petitioner was a student teacher at Morris Elementary School. [A 52.]¹ Certain female members of the fifth grade class in which he taught claimed that he molested them. [A 52.] The prosecution of petitioner for these alleged crimes was unsuccessful. [A 57.]

What Is Not Alleged

Even more significant is what is not alleged in the complaint:

Absent is any allegation that any respondent had any contact with petitioner before the children lodged their complaints. Absent is any allegation that the arrest of petitioner was one made without probable cause or otherwise tainted in any way by the conduct of any respondent. Absent is any allegation that the loss or destruction of evidence affected the ability of petitioner to conduct his defense at trial. Absent is any allegation that this evidence was not otherwise available to petitioner. Absent is any allegation that any evidence was gathered in a manner violative of petitioner's Fourth or Fifth Amendment rights.² [A 49-66.]

Absent is any allegation that there were any "pre-trial restraints" on petitioner's liberty, "other than the condition that [petitioner] appear for trial" following his arrest for probable cause based upon the unsolicited charges of molestation lodged by the female children he taught.³

¹ References to the appendix are to that appearing as a portion of the Petition For Writ of Certiorari submitted by petitioner.

² This illustrates the absurdity of the "examples" (stomach pumping and blackmailing of trial witnesses) offered by petitioner as these bear no relation to the facts alleged in the amended complaint. (See Petition, p. 14.)

³ As noted in the opinion of the Ninth Circuit panel, with this factual pattern, its determination that no federally protected interest is impli-

ARGUMENT

I

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE NINTH CIRCUIT IN THIS CASE AND THOSE OF OTHER CIRCUITS BECAUSE NO COURT HAS HELD PROSECUTION RESULTING FROM ERRORS DURING THE INTERMEDIATE INVESTIGATION PHASE, PRECEDED BY AN ARREST FOR PROBABLE CAUSE UNTAINTED BY THE INVOLVMENT OF STATE AGENTS AND FOLLOWED BY A FAIR TRIAL IS ACTIONABLE UNDER 42 U.S.C. SECTION 1983

Disregarding momentarily the unique factual pattern of this case, it may be seen that petitioner has greatly overstated the purported conflict between the decision of the Ninth Circuit in this case and that of other Circuits. As the Court below observed (A 8-9), its view that malicious prosecution is not actionable under 42 U.S.C. Section 1983, absent a violation of a federally protected right, is in accord with that of virtually every other Circuit.⁴

Interestingly, the Fifth Circuit, considered by the Ninth Circuit to be the only one truly at variance, recently clarified that its position was *not* that malicious prosecution by state officials was sufficient to give rise to a civil rights claim:

cated under these circumstances is supported by the decision of this Court in the case of *Gerstein v. Pugh*, 420 U.S. 103 (1975). [See A 11-12.]

⁴ Reference is made by the court below to the Annotation, *Actionability of Malicious Prosecution Under 42 USCS § 1983*, 79 A.L.R. Fed. 896, 902-03 (1986). Only the Fifth Circuit has squarely held to the contrary. It should be noted, however, that its decision in *Wheeler v. Cosden Oil & Chemical*, 734 F.2d 254, 257-60 (5th Cir. 1984), *modified on other grounds*, 744 F.2d 1131 (5th Cir. 1984), did *not* involve an initial arrest for probable cause untainted by the act of state agents. Rather, the arrest itself was a "set-up" in which a state agent participated.

"In recognizing that cases in this Circuit have held that illegal arrest and bad faith prosecution by public officials acting under color of state law may rise to the level of a constitutional violation, *we need not decide, do not hold and do not mean to intimate, that the rights secured by the Constitution are precisely coextensive with the common law torts of false arrest and malicious prosecution.*" (*Hand v. Gary* 838 F.2d 1420, 1424 fn.3 (5th Cir. 1988), emphasis added.)

We find then the one Circuit potentially in conflict with the decision of the Ninth Circuit in this case "clarifying"—if not rethinking—its position to bring it more in accord with that of all other Circuits. It bears reiteration that the Fifth Circuit has not been called upon to decide a case such as this in which the state actors do not participate in any manner in soliciting the initial complaint and the arrest is one based on probable cause.⁵

II

THE NINTH CIRCUIT PROPERLY CONCLUDED THAT PETITIONER'S FIRST AMENDED COMPLAINT DID NOT STATE A CLAIM ACTIONABLE UNDER 42 U.S.C. SECTION 1983 BECAUSE NO DEPRIVATION OF A FEDERALLY PROTECTED RIGHT IS ALLEGED

It has been seen that neither the propriety of petitioner's arrest nor the intrinsic fairness of his trial are challenged in the First Amended Complaint. Rather, the gravamen of petitioner's complaint is that he sustained damage because he was prosecuted—i.e., *because the trial occurred*. Central to his theory of the case is the notion that the Constitution permits only the guilty to be prosecuted or that "due process" requires that innocence be determined between the time of arrest and trial. This is simply not the law.

⁵ The Ninth Circuit has had little difficulty finding maliciously motivated prosecution actionable under 42 U.S.C. §1983 when there is a violation of the equal protection clause or some other federally protected interest. (See for example *Bretz v. Kelm* 773 F.2d 1026, 1031 (9th Cir. 1985) and *Cline v. Brusett*, 661 F.2d 108, 112 (9th Cir. 1981).)

Petitioner's effort to fill this void by allegations of destruction of exculpatory evidence fails to implicate an interest of constitutional magnitude. To the contrary, in the case of *California v. Trombetta*, 467 U.S. 479, 81 L.Ed.2d 413 104 S.Ct. 2528 (1984), this Court held that for the destruction of evidence to be of "constitutional materiality" (i.e., violative of the due process clause) the,

"... evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (476 U.S. 489.)

With liberal interpretation the First Amended Complaint may be construed as including allegations satisfying the first prong of this test. There is, however, *no allegation* that petitioner was unable to obtain "comparable" exculpatory evidence—or precisely the same evidence—by testimony at trial.

Further, investigative errors after an arrest for probable cause are *not* alone sufficient to implicate constitutionally protected rights. In the case of *Baker v. McCollan*, 443 U.S. 137, 61 L.Ed.2d 433, 99 S.Ct. 2689 (1979), Baker complained of incarceration that occurred because of mistaken identification. His brother, using a duplicate of Baker's driver's license which bore his picture, was arrested and released on bail. Later an arrest warrant issued which was intended for his brother. Baker was stopped for a traffic violation and a routine warrant check revealed that a person of his name was wanted in the county of the original arrest. He protested that the case was one of mistaken identity but was held in custody for several days before the error was confirmed. This Court concludes that, while Baker's complaint may state a claim for false imprisonment under state law against the sheriff who failed to implement proper procedures to discover the error in identity, no constitutional violation was involved if the arrest was based upon probable cause:

"The constitution does not guarantee that only the guilty will be arrested. If it did, section 1983 would provide a cause of

action for every defendant acquitted—indeed, for every suspect released.

“We do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim. The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.” (443 U.S. 137, 145-6.)

The facts of this case are less compelling. Unlike Baker, petitioner was not incarcerated and suffered no loss of liberty. [A 49-66.]

Along these same lines, the Ninth Circuit properly concluded that petitioner suffered no deprivation of a property right beyond that which may be reasonably expected to flow from his arrest for probable cause. On this point, the opinion below reads:

“Schoenfield’s defense costs are harms of the type that would be incurred in any prosecution, and are not a cognizable deprivation of property for due process purposes. The harm to his career that resulted from the stigma of being accused of child molestation is not a cognizable deprivation of liberty or property for due process purposes. See *Paul v. Davis*, 424 U.S. 693, 701-12 (1976). Because no deprivation of a federally protected right occurred, Schoenfield’s remedy, if any, must be in state court.” [A 10-11.]

Based upon the foregoing, it is respectfully submitted that the more difficult questions of whether better trained and less zealous investigators would have retained the tapes of interviews of children who did *not* assert that they were molested or might have more astutely determined whether the span of an adult, male hand on the shoulder of a nine or ten year old, fifth grade girl reached her breast or whether the same adult, male hand placed upon her knee reached the pubic area, need not be answered. The Ninth Circuit properly concluded that, in light of an arrest for

probable cause based upon the complaints of these non-party, young girls, investigative errors by "inadequately trained" and "biased" personnel resulting in prosecution of the case but which did not affect petitioner's ability to obtain a fair trial, may give rise to a common law tort claim for malicious prosecution—but will not support an action predicated upon 42 U.S.C. Section 1983.

A contrary determination would mean that every criminal defendant afforded a fair trial after an arrest for probable cause would be invited to seek compensation under 42 U.S.C. Section 1983 by seizing upon any imperfection in the investigative stage and attributing it to inadequate training and bias. In effect, a decision contrary to that of the Ninth Circuit would serve notice on all prosecutors and their staffs that prosecution of any case in which a guilty verdict is not guaranteed will raise the specter of imposition of liability under 42 U.S.C. Section 1983.

CONCLUSION

The Court of Appeals for the Ninth Circuit properly construed petitioner's First Amended Complaint as alleging the common law tort of malicious prosecution, without implication of any federally protected right, and correctly concluded that no claim was stated under 42 U.S.C. Section 1983. Whether a theoretical conflict exists between the Fifth Circuit and all others, including the Ninth Circuit, is unimportant for present purposes because no court has found 42 U.S.C. Section 1983 to be expansive enough to embrace the alleged factual pattern of this case. The petition should be denied.

Respectfully submitted,

MITCHELL, DEDEKAM & ANGELL

By NANCY K. DELANEY
DALE REINHOLTSEN

Attorneys for Respondents